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No. 85-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the lower court erred in holding that Outer Continental Shelf (OCS) leasing is subject to the restrictions of Section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a), when that statute applies only to lands "situated in Alaska" as to which the United States asserts "title"?

2. Assuming *arguendo* that ANILCA applies to the OCS, whether the lower court erred in holding that the Department of the Interior must comply at the leasing stage of an OCS project with Section 810(a)(1)-(3), which applies only to leases or permits that "would significantly restrict subsistence uses," when the Department properly concluded both that OCS leasing "would not" cause such restrictions and that it must comply with that section at later stages of the project if the issuance of any permits would cause such restrictions?

3. Whether the Ninth Circuit's decision that ANILCA applies to OCS leasing should be retroactively applied to enjoin operations on OCS lands leased before the date of that decision, when its ruling that the OCS is "situated in Alaska" was not foreshadowed by the language of the statute or by prior administrative or judicial rulings, when such retroactive application of ANILCA is not necessary to further the statute's purposes, and when it could result in the disruption of more than $4 billion of OCS investments?

4. Whether the lower court erred by holding that plaintiffs were entitled to an injunction, even though the district court had properly determined that "the

balance of irreparable harm does not favor" them, because they established a probability of success on the merits and because this is not a "rare" or "unusual" case where the injunction would harm the environment or disrupt a limited class of long-run contracts?

PARTIES TO THE PROCEEDINGS

The petitioners in No. 85-1239 are Amoco Production Company, ARCO Alaska, Inc., Exxon Corporation, Mobil Exploration & Producing Services, Inc., Shell Western E & P, Inc., Sohio Alaska Petroleum Company, Texaco, Inc., and Union Oil Company of California.* The petitioners in No. 85-1406 are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The respondents are People of the Village of Gambell, People of the Village of Stebbins and Nunam Kitlutsisti.

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* These petitioners' parent companies, subsidiaries and affiliates are identified in Appendix E (A64) to the petition.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

Two opinions of the United States Court of Appeals for the Ninth Circuit are directly relevant to this case: *Village of Gambell* v. *Clark*, 746 F.2d 572 (9th Cir. 1984) (hereafter *Gambell I*), reprinted in Appendix A to the petition for certiorari (A1), and *Village of Gambell* v. *Hodel*, 774 F.2d 1414 (9th Cir. 1985) (*Gambell II*), reprinted in Appendix B (A23). The unreported opinion of the United States District Court for the District of Alaska in *Gambell II* is reprinted at Appendix C to the petition (A55). That court's opinion in *Gambell I* is reprinted at Appendix E to the petition of the federal defendants in No. 85-1406 (Fed. Petn. App. 68a).

JURISDICTION

This Court's jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is based upon 28 U.S.C. § 1254(1). That court's judgment was entered on October 25, 1985. (A63). The petition for a writ of certiorari was filed on January 22, 1986, and was granted on June 2, 1986.

STATUTES

Section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120(a), provides:

> "In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—
>
> "(1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;
>
> "(2) gives notice of, and holds, a hearing in the vicinity of the area involved; and
>
> "(3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with

> sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions."

Section 102(3) of ANILCA, 16 U.S.C. § 3102(3), defines "public lands" as used in Section 810(a) as

> "land[s] situated in Alaska which, after December 2, 1980, are Federal lands. . . ."

Section 102(2) of ANILCA, 16 U.S.C. § 3102(2), in turn, defines "Federal Lands" as

> "lands the title to which is in the United States after December 2, 1980."

STATEMENT OF THE CASE

A. The Origins of the Sale No. 57 Case

ANILCA was enacted in December 1980, and Outer Continental Shelf (OCS) leasing proceeded for more than two years without any claims that the statute applied to the OCS. However, on March 4, 1983, the Villages of Gambell and Stebbins filed a complaint against OCS Sale No. 57 (Norton Sound) alleging that the United States must comply with Section 810 of ANILCA prior to leasing OCS lands. (JA 15, 18). In the alternative, plaintiffs alleged that they held aboriginal hunting and fishing and trust rights to the OCS that would be infringed by OCS leasing. (JA 16, 18).

Plaintiffs moved for a preliminary injunction to prevent the sale. Their motion was denied by the district court, as was their motion to the Ninth Circuit for an emergency injunction pending appeal. Accordingly, Sale No. 57 took

place as scheduled on March 15, 1983. Fifty-nine tracts were leased for more than $300 million.

On April 11, 1983, the district court entered summary judgment for defendants. It found that plaintiffs' claims of aboriginal title to the OCS were inconsistent with paramount United States jurisdiction and control of the OCS. (Fed. Petn. App. 69a). The district court also found that the leasing of OCS minerals was not subject to Section 810 of ANILCA because OCS lands are not "situated in Alaska" and thus are not among the "public lands" to which the section applies. (Fed. Petn. App. 68a).

B. The Ninth Circuit's Ruling in *Gambell I*

On November 2, 1984, the Ninth Circuit affirmed the district court's rejection of plaintiffs' aboriginal title and trust claims. *Gambell I*, 746 F.2d at 573 (A3). Unlike the district court, however, the court of appeals did not rest its decision on the paramountcy doctrine. Instead, the Ninth Circuit "assum[ed] rather than decid[ed] that [plaintiffs] had an aboriginal right to hunt and fish in the waters of Norton Sound." 746 F.2d at 573 n.1 (A3). After making this assumption, the court went on to hold that plaintiffs' "rights were extinguished by the [Alaska Native] Claims Settlement Act," Section 4(b), 43 U.S.C. § 1603(b) (ANCSA). 746 F.2d at 573 n.1 (A3).

In so ruling, the Ninth Circuit construed the phrase "in Alaska" as used in Section 4(b) of ANCSA as extending to the OCS. 746 F.2d at 575 (A6). Then, reasoning that ANCSA and ANILCA should be construed *in pari materia*, the Ninth Circuit held that the OCS must also be "situated in Alaska" for purposes of ANILCA. 746 F.2d at 579 (A14).

The court of appeals remanded the ANILCA issue to the district court to determine whether Interior had "complied with the requirements of . . . section [810], albeit acting under other statutes," such as the National Envi-

ronmental Policy Act, 42 U.S.C. § 4321 (NEPA). 746 F.2d at 582 (A21). The court also directed the district court to determine, in the event that there had not been such compliance, whether "the proper remedy is to maintain the status quo unless and until the Secretary complies with section 810. . . ." *Id.*[1]

C. Proceedings on Remand in *Gambell I*

After *Gambell I*, the Department of the Interior proceeded to comply with ANILCA as it affected Sale No. 57 by preparing, in the manner suggested by the court of appeals, a post-sale ANILCA evaluation. That evaluation addressed the three issues specified in the first tier of Section 810(a): effects on subsistence, availability of other lands, and other alternatives. The Department concluded that neither the leasing nor the exploration stages of Sale No. 57 would significantly restrict subsistence, but that, if reached (only a 13% possibility), the production stage could do so. (Fed. Petn. App. 106a). In the light of this conclusion, Interior determined that it need not at the leasing stage give the notice, hold the hearings or make the determinations specified in Section 810(a)(1)-(3), although it recognized that it might have to follow these procedures and make these determinations prior to the production stage.

On April 4, 1985, plaintiffs filed a motion in the district court for a preliminary injunction against proposed 1985 exploratory drilling operations in the Sale No. 57 area.[2] They argued that Interior could not comply with ANILCA

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[1] Neither side at that time sought certiorari with respect to these rulings. Certiorari was sought in a companion case, *Inupiat Community of the Arctic Slope* v. *United States*, 746 F.2d 570 (9th Cir. 1984), which raised solely the title issue. On October 7, 1985, the writ sought in that case was denied. 106 S. Ct. 68.

[2] Exploration had been conducted in the summer of 1984, prior to the Ninth Circuit's *Gambell I* decision, pursuant to Interior's approval of exploration plans. These plans allowed continued operations in 1985.

by virtue of its compliance with NEPA and other statutes and that full compliance with Section 810(a)(1)-(3) was required, at the leasing stage of an OCS project, if significant restrictions of subsistence might occur at the final production stage.

D. OCS Sale No. 83 (Navarin Basin)

OCS Sale No. 83 took place in April 1984 (prior to *Gambell I*) without any explicit ANILCA analysis and without any litigation challenge. The sale resulted in the leasing of 163 tracts in the Navarin Basin for more than $500 million. The Navarin Basin lies between 250 and 400 miles off the coast of Alaska. (JA 47).

After *Gambell I*, Interior prepared ANILCA evaluations to assess the applications by three companies to conduct exploratory drilling operations in the Navarin Basin in 1985. Those evaluations considered the issues specified in the first tier of Section 810(a) of ANILCA and concluded that no "significant restriction of subsistence uses is reasonably foreseeable from the proposed [exploration] in the Navarin Basin." (Fed. Petn. App. 115a). Accordingly, Interior granted the Navarin exploration permits in early 1985.

On April 25, 1985, the Village of Gambell and Nunam Kitlutsisti filed a complaint alleging that Sale No. 83 violated ANILCA (JA 20), and sought a preliminary injunction against Sale No. 83 exploration.

E. Proceedings in the District Court on Plaintiffs' Preliminary Injunction Motions

The Sale Nos. 57 and 83 cases were consolidated for the purpose of ruling upon plaintiffs' preliminary-injunction motions. Defendants responded to those motions in three ways:

First, they argued that there had been adequate consideration of all of the subsistence factors specified in the

first tier of Section 810(a) by virtue of Interior's compliance with NEPA and other statutes.

Second, defendants relied upon the post-*Gambell I* ANILCA evaluations which showed that neither leasing nor exploration would significantly restrict subsistence.

Third, defendants argued that exploration would not result in any irreparable injury to plaintiffs, but that an injunction would cause the companies that had made financial commitments for 1985 exploration to suffer immediate losses of about $70 million. (JA 25-55). Moreover, defendants pointed out that an injunction would interfere with OCS exploration in a manner contrary to the explicit policies of the OCS Lands Act, 43 U.S.C. § 1802(1).[3]

On May 23, 1985, the district court issued its opinion. (A55). The court recognized that

> "[t]he effect of the leases on subsistence and alternatives which would reduce or eliminate the impact on subsistence were discussed at some length in the respective EIS's for the lease sales. The availability of other lands was discussed in the context of the EIS for the Secretary's Five Year Leasing plan." (A57).

Nonetheless, the court found that Interior's compliance with NEPA and other statutes could not satisfy ANILCA because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation." (A57-58).

The court also held that if an ANILCA evaluation concluded that the production stage "may" cause significant subsistence restrictions, as was the case for Sale No. 57, it was necessary for the Department to comply, at the

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[3] The City of St. Paul, a Native community on the Pribilof Islands, filed an *amicus* brief supporting defendants. It argued that an injunction would frustrate the plans and financial commitments that it had made to serve as a staging point for OCS exploration.

leasing stage, with the notice, hearings and determinations requirements of Section 810(a)(1)-(3). (A61).

Thus, the trial court decided that plaintiffs were likely to prevail on the merits of their claims that both Sale Nos. 57 and 83 were conducted in violation of ANILCA. The district court did not, however, leap from this conclusion to issuance of the preliminary injunction sought by plaintiffs. Instead, it noted that Interior had properly found that leasing and exploration for both sales would not significantly restrict subsistence. The court also noted that there was ample opportunity, prior to the production stage of either sale, fully to comply with Section 810(a). Finally, the court found that the delay in exploration that would be caused by an injunction "may cause irreparable harm to this Nation's quest for new oil resources and energy independence." (A62-63). On this basis, the district court denied plaintiffs' motions for preliminary injunctions, holding that "the balance of irreparable harm does not favor the movants" and that "the public interest favors continued oil exploration. . . ." (A63).

F. The Ninth Circuit's Ruling in *Gambell II*

Plaintiffs immediately moved for emergency relief in the Ninth Circuit to forestall 1985 exploration. Their motion was denied. (Fed. Petn. App. 70a). Thereafter, 1985 exploration commenced in both Norton Sound and Navarin Basin. That year's operations were concluded in the fall of 1985.

On October 25, 1985, the Ninth Circuit (Alarcon, Praegerson, C.JJ.; Dimmick, D.J., dissenting) reversed the district court and directed entry of "a preliminary injunction enjoining all activities in connection with Lease Sale 57 and Lease Sale 83. . . ." *Gambell II*, 774 F.2d at 1431 (A48). The court affirmed the district court's holdings both that Interior could not comply with ANILCA by virtue of its compliance with other statutes and that it was necessary for Interior, at the leasing stage, to comply with

Section 810(a)(1)-(3), if it determined that significant restrictions "may" occur at the final production stage of the project. *Gambell II*, 774 F.2d at 1420-21 (A31-34).

The court of appeals, however, disagreed with the district court's conclusion that it had the discretion to deny plaintiffs' motion for preliminary injunction. It ruled instead that the probable violation of an environmental statute entitles plaintiffs to an injunction except in "rare" or "unusual" cases where the injunction might itself "threaten the environment," 774 F.2d at 1424 (A40), or "interrupt[ ] the performance of long-term contracts," 774 F.2d at 1425 (A40). The court of appeals also rejected petitioners' arguments that its holding in *Gambell I* applying ANILCA to the OCS should only be applied prospectively.[4]

SUMMARY OF ARGUMENT

I. The Ninth Circuit's application of Section 810(a) of ANILCA to the OCS ignores the plain meaning of the terms of the statute, the context in which they are used throughout ANILCA, and relevant legislative history.

A. Section 810(a) applies only to "public lands," which ANILCA defines as lands "situated in Alaska" as to which the United States asserts "title." By definition, the OCS commences at the exterior boundaries of Alaska and is thus not "situated in Alaska." Moreover, although the United States has asserted "title" on behalf of the States to that part of the continental shelf that underlies the

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[4] Judge Dimmick dissented on two grounds. First, she found that the majority's rule that, absent narrowly defined "unusual" circumstances, an injunction must issue when an environmental statute has been violated was inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). 774 F.2d at 1429 (A50). Second, she disagreed with the retroactive application of *Gambell I* to Sale No. 83, noting the $60 million in commitments that the companies had made for 1985 drilling in the Sale No. 83 region and the failure of plaintiffs to file suit prior to the making of those commitments. *Id.*

territorial sea, it has carefully refrained from asserting title to the OCS.

B. Congress' use of the term "public lands" throughout ANILCA shows that it did not intend that phrase to extend to the OCS. For example, when Congress asserted in 16 U.S.C. § 3101(d) that ANILCA provides for a "proper balance" for and "sufficient protection" of the "public lands," it could not have intended for that phrase to apply to the OCS, since the OCS Lands Act (OCSLA), 43 U.S.C. § 1331, not ANILCA, ensures such "balance" and "protection" for the OCS.

C. ANILCA's legislative history shows that it was the third and final chapter in a process for the apportionment of lands within Alaska between the State, the federal government, and Native Alaskans. The three major statutes which define that process—the Alaska Statehood Act, ANCSA, and ANILCA—all use the terms "public lands" or "public lands in Alaska" in contexts which can only pertain to lands within the State, not the OCS. Moreover, the specific legislative history of Section 810(a) shows that it was designed solely to ensure that all federally owned lands within the State's boundaries would be available for subsistence uses.

II. Even assuming *arguendo* that ANILCA applies to the OCS, the Ninth Circuit erred in holding that Interior must comply with the second-tier requirements of Section 810(a)(1)-(3), at the leasing stage of an OCS project, when OCS leasing "would not" significantly restrict subsistence, but when the production stage, should it occur, could cause such restrictions.

A. The second-tier requirements of the statute apply only when a specific disposition of public lands "would" significantly restrict subsistence. The Ninth Circuit ignored the plain meaning of the term "would" when it held that those requirements must be satisfied if a proposed dis-

position of public lands is unlikely to, but "may" ultimately cause significant restrictions of subsistence.

B. This Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), that OCS leasing does not "directly affect[]" the coastal zone under Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1), shows that OCS leasing would not significantly restrict subsistence. Under both the CZMA and ANILCA, leasing itself has no effects upon the interests protected by the statutes. Moreover, further review and analysis under both the CZMA and ANILCA are required prior to the authorization of any later stage which could have such impacts.

III. The Ninth Circuit's mandated injunction against OCS exploration was predicated upon its view that lease sales held prior to *Gambell I* can be retroactively invalidated. Such a retroactive application of *Gambell I* is contrary to this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), because *Gambell I* established a new principle of law that was not foreshadowed, because retroactive application of *Gambell I* will not further the operation of ANILCA, and because retroactive invalidation of pre-*Gambell I* OCS leases would cause grave inequities by, *inter alia*, disrupting more than $4 billion in investments in OCS leases.

IV. The "Ninth Circuit rule," relied upon below to reverse the district court for exercising discretion to deny plaintiffs a preliminary injunction after they had shown a probability of success on the merits, is contrary to this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

A. The court of appeals' "rule" commands an injunction in environmental litigation whenever plaintiffs have established a probability of success, except in "rare" or "unusual" cases in which an injunction would harm the environment or would disrupt the performance of long-

term contracts. *Weinberger*, by contrast, holds that, absent explicit indications in a statute to the contrary, courts retain broad discretion to deny injunctions notwithstanding a violation of law. ANILCA contains no such indications. The "Ninth Circuit rule" also violates the principles of *Weinberger* by awarding plaintiffs an injunction, even though, as here, they can show no irreparable injury and even though, as here, an injunction would result in severe harm to defendants and to the public interest.

B. The Ninth Circuit's application of its rule in this case led it to impose an injunction which does not alleviate any purported harm that plaintiffs suffered. Instead, the principal effect of the injunction is to impose punishment in contravention of well-established principles of equity.

ARGUMENT

I. SECTION 810 OF ANILCA DOES NOT APPLY TO THE OCS.

The Ninth Circuit has applied Section 810(a) of ANILCA to the OCS on the premise that it is "situated in Alaska." In plaintiffs' view, this application of the statute to the OCS "will concededly change the contours of some OCS lease sales; delay OCS leasing off Alaska. . . . [and] may prohibit some . . . lease sales." (Resp. Opp. to Petns. 17).

There is no basis for applying Section 810(a) to the OCS. The plain meaning of the statute's terms, the context in which those terms are used through ANILCA, and the legislative history all show that Congress did not intend to make the OCS subject to the restrictions of Section 810(a).

A. The Ninth Circuit's Construction of Section 810 of ANILCA Is Contrary to the Plain Meaning of Its Terms.

ANILCA deals with a multitude of Alaska land-use issues and spans 181 pages of the Statutes at Large, 94 Stat. 2371-2551. In these 181 pages there is but a single reference to the OCS, and it is for the purpose of ensuring

that ANILCA does not apply there: Section 1001(a), 16 U.S.C. § 3141(a), regarding a "Federal North Slope Lands Study," directs that it shall not encompass any "submerged lands on the [OCS]. . . ."[5]

The plain meaning of the terms of ANILCA, which show that it does not apply to the OCS, take on added significance when they are read against the absence of any contrary indications in the statute. Section 810 governs only the disposition of "public lands." 16 U.S.C. § 3120(a). ANILCA defines "public lands" as "land[s] situated in Alaska which . . . are Federal lands. . . ." *Id.* at § 3102(3). "Federal lands," in turn, "means lands the title to which is in the United States after December 2, 1980." *Id.* at § 3102(2).

Thus, to prevail here respondents must show that the OCS is "situated in Alaska" and that the United States asserts "title" to it. They cannot carry their burden on either issue.

1. The OCS Is Not "Situated in Alaska."

The OCS is not "situated in Alaska" in the common usage of those terms. Indeed, the Navarin Basin, the locus of Sale No. 83, lies more than 250 miles off the west coast of Alaska. Anyone asked to identify Alaska on a map would point to its land mass, not the vast oceans that surround it.

This common perception is anchored in the text of the Alaska Statehood Act, the OCSLA, and related legislation. Alaska was admitted to the Union on an "equal footing" with other States and was given "the same rights as . . . existing States" under the Submerged Lands Act of 1953,

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[5] Since Section 1001(a) applies to "Federal lands," not "public lands," which ANILCA defines as "Federal lands situated in Alaska," Congress out of an abundance of caution excluded OCS lands from its coverage. As we show below, pp. 15-19, *infra*, the OCS is not, in any event, "Federal land" because the United States has not asserted title to it.

43 U.S.C. § 1301.[6] Under that Act, Alaska has title and its boundaries extend to that part of the continental shelf lying within three miles of its coastline. 43 U.S.C. §§ 1301(a)(2), 1301(b). Under the OCSLA, the *Outer* Continental Shelf lies "seaward and outside" of the State boundaries established by the Submerged Lands Act. 43 U.S.C. § 1331(a). Clearly, therefore, under the plain meaning of the terms of ANILCA, the OCS is not "situated in Alaska."

The Ninth Circuit's contrary conclusion was based on the premise that Section 810 of ANILCA should be read as having the same scope as Section 4(b) of ANCSA, 43 U.S.C. § 1603(b). That section of ANCSA extinguished

> "all aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist. . . ."

After ruling that Section 4(b) extinguished Native claims of aboriginal title to the OCS, the lower court found "compelling" respondents' argument that Congress "intended the preference and procedural protections for subsistence uses mandated [in Section 810] . . . to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary." *Gambell I*, 746 F.2d 579-80 (A15). There are a number of flaws in the Ninth Circuit's reasoning.

First, defendants consistently denied and plaintiffs never proved that Native Americans had aboriginal title to any lands offshore Alaska. Having no record before it on this issue, the Ninth Circuit did not resolve this dispute. Instead, it merely "assum[ed] rather than decid[ed] that

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[6] Alaska Statehood Act, P.L. 85-508, Preamble, 72 Stat. 339 (1958); *Id.* at § 6(m), 72 Stat. at 343.

appellants had aboriginal title" to the OCS as the predicate for its reliance upon ANCSA Section 4(b) to dispose of plaintiffs' title claims. 746 F.2d at 573 n.1 (A3).

Second, Section 4(b) of ANCSA was not essential to extinguish aboriginal title to the OCS, even assuming it ever existed. The defendants in *Gambell I* had demonstrated and the district court had ruled that the federal government's "paramount" rights over the OCS, as recognized by pre-ANCSA decisions of this Court, precluded any claims of aboriginal title.[7] Defendants also argued that the OCSLA in 1953 extinguished any aboriginal titles. The Ninth Circuit did not discuss the paramountcy cases and specifically refused to consider whether the OCSLA vitiated plaintiffs' title claims. 746 F.2d at 573 n.1 (A3).

Third, Section 810 of ANILCA applies only to "public lands"—*i.e.*, lands "situated in Alaska" as to which the United States claims "title." The phrase "public lands" does not appear in Section 4(b) of ANCSA because Congress intended to extinguish all aboriginal title as to all lands, whether federally, State or privately owned. Patently, the scope of Section 810's protection of subsistence was not intended to be "co-extensive with the extinguishment of aboriginal rights" in the manner declared by the Ninth Circuit.

2. Plaintiffs Cannot Show that the United States Asserts "Title" to the OCS.

ANILCA and its legislative history are silent as whether the United States asserts title to the OCS. However, the House Merchant Marine and Fisheries Committee—one of the two committees of the House which reported out the bills that subsequently were enacted as ANILCA[8]—re-

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[7] *See, United States* v. *California*, 332 U.S. 9, 38-39 (1947); *United States* v. *Texas*, 339 U.S. 707, 719 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 705-06 (1950).

[8] *See*, 20-21 & n. 14, *infra*.

cently declared that the United States does not assert title to the OCS:

> "The U.S. does not hold title to the OCS, nor is the OCS subject to 'sale or other disposition under the general laws.' As opposed to full dominion and control, the U.S. has claimed only limited sovereignty over the exploration and development of natural resources on and within the OCS. The U.S. in no way exercises title to or sovereignty over the area itself. Except for the resources-related claims or jurisdiction over the fisheries and mineral deposits of the OCS, the area is international and beyond U.S. control, as recently reiterated by the President's Exclusive Economic Zone Proclamation." H. Rep. No. 99-330, 99th Cong., 1st Sess. p. 591-92 (1985).

On this basis, the Committee opined that the OCS does not constitute "public lands" as that term has "enjoy[ed] two centuries of well-established meaning. . . ." *Id.* at 591. The House Merchant Marine and Fisheries Committee's view of the title issue is fully supported by the history of the United States' assertion of limited rights to the OCS.

In 1945, President Truman proclaimed that the United States

> "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control . . . . The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." 59 Stat. 884, 10 Fed. Reg. 12,303 (September 28, 1945).

In 1953, Congress implemented the Truman Proclamation when it passed the Submerged Lands Act, 43 U.S.C. § 1301, and the OCSLA. The former statute does vest in

the States "title" to "submerged lands," 43 U.S.C. § 1311(a), within the three-mile (or in two instances three-league) territorial sea, 43 U.S.C. § 1301(b). However, the OCSLA carefully avoided the language of title and proprietorship. Echoing the Truman Proclamation, it instead provides that "the subsoil and seabed of the [OCS] appertain to the United States and are subject to its jurisdiction, control, and power of disposition . . .." 43 U.S.C. § 1332(1).

Congress chose these divergent descriptions of the nature of state and federal jurisdiction over the shelf after receiving testimony from the State Department regarding the need to preserve the high-seas character of the waters above the OCS.[9] State testified that within the limits of the territorial seas—*i.e.*, submerged lands as defined by the Submerged Lands Act—the United States or a state could exercise full sovereignty over the seabed and superjacent waters, subject only to a right of "innocent passage" by vessels of other countries. In contrast, in areas beyond the territorial sea—*i.e.*, the OCS—the United States would not assert full sovereignty, for, if emulated by other nations, such sovereignty could interfere with freedom of navigation and overflight.[10]

Subsequently, the United States became a party to the Convention on the Continental Shelf adopted by the 1958 United Nations Conference on Law of the Sea. The Convention recognizes that coastal states "exercise[ ] over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources," but that

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[9] Submerged Lands: Hearings Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. 1051 (1953) (statement of Jack B. Tate, Deputy Legal Advisor, Department of State).

[10] *Id.* at 1070-71, 1079-80. *See also*, 43 U.S.C. § 1332(2), making it explicit that OCSLA "shall be construed in such a manner that the character of the waters above the [OCS] as high seas . . . shall not be affected."

these rights coexist with the rights of other nations to make use of the shelf—for example, by laying submarine cables and pipelines—and "do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters."[11]

The Supreme Court of Canada has recently distinguished the "sovereign rights" of the Convention from "the full sovereignty (saving only other nations' rights of innocent passage) which international law accords to coastal States over their territorial sea." *Hibernia Reference*, [1984] 1 S.C.R. 86, 96. In resolving a dispute between federal and provincial governments regarding ownership and control of OCS minerals, the court rejected arguments by Newfoundland that it had "proprietary" rights in the Continental Shelf:

> "We do not think Continental Shelf rights are proprietary in the ordinary sense. . . . [T]hey are 'sovereign rights' and they appertain to the coastal State as an extension of rights beyond where its ordinary sovereignty is exercised." *Id.* at 97.

The Canadian Supreme Court thus held that a coastal State "cannot 'own' the Continental Shelf as it can 'own' its land territory," and emphasized that "regulation by international law of the uses to which the Continental Shelf may be put is simply too extensive to construe the shelf to be part of the State's territory." *Id.* at 96.[12]

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[11] The Convention on the Continental Shelf, done April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311, Arts. 2(1) and 3, ratified March 24, 1961.

[12] The Canadian Supreme Court properly refused to follow a dictum of the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases, 1969 I.C.J. 3, 31, that international law attributes "title" to a coastal State with respect to its continental shelf. In the *North Sea* case, the Convention did not apply to resolution of the dispute at hand, since one of the parties had not ratified it. *Id.* at 26-27. Moreover, the dispute did not turn on the resolution of a title issue.

It is not necessary in this case for the Court to decide whether the United States could assert title to the OCS consistent with its obligations under international law. Instead, it suffices to show that both Congress and the Executive Branch have recognized the delicacy of this question. In these circumstances, it is inconceivable that when Congress enacted ANILCA it silently harbored the view that the United States holds title to the OCS.

B. Numerous Provisions of ANILCA Show that Congress Did Not Intend "Public Lands" to Include the OCS.

The conclusion that the OCS is not part of the "public lands" to which ANILCA applies is reinforced by the context in which the phrase is used throughout the Act. For example, one of the basic findings underlying the Act, Section 101(d), 16 U.S.C. § 3101(d), states that ANILCA

> "provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values *on the public lands in Alaska*, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition *of the public lands in Alaska* pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those *public lands* necessary and appropriate for more intensive use and disposition. . . ."(emphasis added).

ANILCA deals exhaustively with issues concerning the federal government's management role as it relates to onshore lands in Alaska. But it is the OCSLA—*see, e.g.*, 43 U.S.C. §§ 1801-02, 1344(c), 1345(c)—not ANILCA, which provides for the "proper balance" involved in determining what OCS lands should be leased and how to protect environmental values as development proceeds. Plainly,

therefore, Congress limited the "sufficient protection" and "proper balance" for "the public lands in Alaska" referred to in Section 101(d) of ANILCA to onshore lands, not the OCS.

Other provisions of ANILCA lead to the same conclusion. Section 805(d), 16 U.S.C. § 3115(d), provides that the Secretary of the Interior shall be excused from his obligations to provide for local and regional participation in managing "public lands" for subsistence (*see, e.g.*, 16 U.S.C. §§ 3115(a)(1) & (a)(3)(C)), "if . . . the State enacts and implements laws of general applicability . . . for the taking of fish and wildlife *on the public lands* for subsistence uses" (emphasis added). Given the at-best indirect authority which Alaska has with respect to fish and wildlife on the OCS, this provision plainly contemplates that the term "public lands" is synonomous with on-shore lands.

Section 1008(a) of ANILCA, 16 U.S.C. § 3148, vividly illustrates that the term "federal lands of Alaska," which is similar to "public lands in Alaska," cannot extend to the OCS. That section provides that

> "[t]he Secretary shall establish, pursuant to the Mineral Leasing Act of 1920, as amended, an oil and gas leasing program *on the federal lands of Alaska* . . ., other than lands included in the National Petroleum Reserve—Alaska." (emphasis added).

The OCSLA, not the Mineral Leasing Act, governs oil and gas leasing on the OCS; no OCS leasing program can be developed under the Mineral Leasing Act. Instead, the Secretary is required by the OCSLA to develop a program for the leasing of OCS lands pursuant to the detailed provisions of that Act. 43 U.S.C. § 1344.[13]

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[13] The reference in other sections of ANILCA to leasing "public lands" or "federal lands" under the Mineral Leasing Act further demonstrates that Congress did not intend that the phrase "public lands in Alaska"

C. The Legislative History of ANILCA Shows that Its Subsistence Provisions Do Not Apply to OCS Lands.

1. The Background of ANILCA Show that the Term "Public Lands" Does Not Include the OCS.

The Ninth Circuit's construction of ANILCA as extending to the OCS ignores the role of the statute in the process of State and Native selection and federal withdrawal of lands pursuant to the 1958 Alaska Statehood Act and ANCSA. The portion of the House Report written by the Committee on Merchant Marine and Fisheries succinctly places ANILCA in context with these earlier enactments:

> "The Alaska National Interest Lands, commonly called the (d)(2) lands issue, represents the last stage of a 20 year effort to resolve the status of the 375 million acres under federal stewardship in the State of Alaska. The 1958 Statehood Act granted the State of Alaska the right to select 104 million acres for State ownership. In 1971, [ANCSA] resolved outstanding Native claims to many areas of the State by setting aside 44 million acres for selections by Native village and regional corporations. Additionally, these corporations will receive some $962 million.
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> "In addition to resolving the Native claims to the State, [ANCSA] provided a study of other lands to be proposed as additions to the National Park, Wildlife Refuge, Forests, and Wild and Scenic River Systems. Section 17(d)(2) of the Act authorized the Secretary of the Interior to withdraw up to 80 million acres of land to be studied for possible addition to the four systems. Under that section, Congress had

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would include any part of the OCS. *See, e.g.*, Section 1010(a), 16 U.S.C. § 3150(a), referring to an assessment of the "oil, gas, and other mineral potential on all public lands in the State of Alaska"; Section 1201(f), 16 U.S.C. § 3181(f), withdrawing "all federal lands" within the Bristol Bay region "from leasing under the Mineral Leasing Act."

until December 1978 to act on the Secretarial withdrawal."[14]

ANILCA was Congress' response to its obligations in ANCSA to define the way in which the 80 million acres of so-called "d-2 lands"—*i.e.*, ANCSA § 17(d)(2), 43 U.S.C. § 1616(d)(2)—were to be placed into national parks, wildlife refuges, forests, and river systems.

The Statehood Act, ANCSA, and ANILCA all use the same phrase "public lands" or "public lands in Alaska" to deal with the related problems of State selection of lands under the Statehood Act, State and Native selections under ANCSA, and federal withdrawal and disposition of lands under ANCSA and ANILCA. In all three, it is clear that that phrase pertains exclusively to lands within the boundaries of the State and does not extend to the OCS.

a. Alaska Statehood Act

When admitted into the Union, Alaska was granted the right to select "from the public lands of the United States in Alaska" up to 102,550,000 acres. Alaska Statehood Act, P.L. 85-508, § 6(b), 72 Stat. at 340. Obviously, the rights of the State to select "from the public lands . . . in Alaska" did not extend to the OCS. To have given Alaska such rights when they were not enjoyed by other States would have been inconsistent with its "equal footing" admission. *See*, pp. 13-14, *supra*.

Moreover, under the OCSLA, the OCS "is a vital national resource reserve held by the federal government for the public. . . ." 43 U.S.C. § 1332(3). It is available for leasing to allow mineral development after the payment of bonuses, rentals and royalties to the United States. 43 U.S.C. §§ 1334(a), 1337. It is not available for conveyance

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[14] H. Rep. No. 96-97, Part II, 96th Cong., 1st Sess. 92 (1979). *See also, id.*, Part I, at 142; S. Rep. No. 96-413, 96th Cong., 1st Sess. 129 (1979).

to the States. Accordingly, the phrase "public lands of the United States in Alaska" as used in the Statehood Act did not extend to the OCS.

b. ANCSA

When ANCSA was passed in 1971, the State had only selected about 25% of the "public lands" to which it was entitled under the Statehood Act because, inter alia, of complications arising out of Native claims.[15] Thus, the vast majority of Alaska lands were still owned by the United States.

Section 17(d)(2) of ANCSA, 43 U.S.C. § 1616(d)(2), created a process for the United States to withdraw "public lands" that had not yet been identified for selection by the State to allow their incorporation into parks and the like, while making the balance of these lands available for selection by the State or by Native corporations in settlement of their claims.[16] It "directed [the Secretary] to withdraw" from appropriation or from selection by the State or by Native Corporations "up to, but not to exceed, eighty million acres of unreserved public lands in the State of Alaska . . . deem[ed] . . . suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic River Systems. . . ." 43 U.S.C. § 1616(d)(2)(A). "[A]ll unreserved public lands not withdrawn" were made "available for selection by the State and for appropriation under the public lands laws." *Id.* at §1616(d)(2)(B).

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[15] H. Rep. No. 96-97, Part I at 235.

[16] Under ANCSA "public lands" means

> "all Federal lands and interests therein located in Alaska except: (1) the smallest practical tract . . . enclosing land actually used in connection with the administration of any Federal installation and (2) land selections of the State of Alaska which have been patented or tentatively approved [for transfer to the State] under section 6(g) of the Alaska Statehood Act . . . or identified for selection by the State prior to January 17, 1969." 43 U.S.C. § 1602(e).

It is, accordingly, perfectly clear that the "d-2 lands" of ANCSA were exclusively federally owned lands located within the State's boundaries. Any broader reading of "public lands in the State of Alaska" as extending to the OCS would have had the impermissible effect of permitting the State to select OCS lands.

c. ANILCA

Section 17(d)(2)(C) of ANCSA directed the Secretary to advise the Congress over a two-year period as to the lands he had withdrawn pursuant to Section 17(d)(2)(A) and to submit recommendations with respect to the ultimate disposition of such lands. Congress then gave itself five years to act upon the Secretary's recommendations. 43 U.S.C. § 1616(d)(2)(D). ANCSA was enacted on December 18, 1971. Thus, Congress contemplated that it would be able to resolve the "d-2 lands" issue by December 1978.

Congress did not meet this deadline. However, in late 1978, to preserve the status quo, Secretary of the Interior Andrus withdrew 110 million acres of "public lands" in Alaska by virtue of his authority under the Federal Land Management and Policy Act (FLMPA), 43 U.S.C. § 1701.[17] At the same time, President Carter designated 56 million more acres of such lands as "Monuments" so as similarly to prevent them from being disposed of pending Congress' resolution of the d-2 issue.[18] ANILCA, as finally enacted in December 1980, superseded these Executive withdrawals and placed much of the lands affected by them within designated conservation units—*i.e.*, parks, refuges, forests and scenic river systems.[19]

Thus, ANILCA represents the culmination of a legislative process begun in 1958 and completed in 1980 that

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[17] H. Rep. No. 96-97, Part I at 142. FLPMA does not apply to the OCS. 43 U.S.C. § 1702(e)(1).

[18] H. Rep. No. 96-97, Part I at 142.

[19] *Id.* at 143.

addressed the complicated issue of apportioning lands in Alaska between the State, Native Alaskans, and the United States. The phrase "public lands" was used in all three statutes in a context that could only pertain to lands within the State's boundaries, not the OCS.

2. The Subsistence Provisions of ANILCA Were Never Intended To Extend to the OCS.

Plaintiffs have argued previously that Section 810, as well as the rest of Title VIII of ANILCA, can be read as having a different geographic scope than other parts of the statute, even though the phrase "public lands" as used there carries the same meaning that it does throughout the statute. There is simply no basis on the face of the statute for reading ANILCA's subsistence provisions more broadly than the rest of the statute. In any event, the specific legislative history of those provisions clearly shows that they were never intended to exceed the geographic scope of the rest of the statute.

The initial d-2 lands bills addressed subsistence by recognizing that it should be permitted within the conservation units ultimately created from the d-2 lands.[20] Thus, H.R. 39, 95th Cong., 1st Sess., the bill introduced on January 4, 1977, by Congressman Udall, Chairman of the Committee on Interior and Insular Affairs of the House of Representatives and principal architect of ANILCA, provided that

> "[T]he Secretary shall permit the continuation of such subsistence uses of the fish, wildlife and plant resources within the areas added to existing units or

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[20] *See, e.g.*, S. 1687, 94th Cong., 1st Sess. § 108 (1975), reproduced in Hearings on S. 1687, *et al.*, Before the Committee on Interior and Insular Affairs, U.S. Senate, 94th Cong., 1st Sess. 15-16 (1975). It appears that S. 1687 was drafted by the Department of the Interior in December 1973. *See, id.* at 130-31, 143.

> established by titles I, II, III and IV of this Act." H.R. 39, § 701(a).[21]

This approach had the support of the Administration. In the April 1977 hearings on H.R. 39, Secretary Andrus recommended that "subsistence uses be allowed on most of the D-2 proposals where these uses are important and traditional."[22]

This approach to the subsistence issue was not, however, fully acceptable to the Alaskan Natives. They had delegated responsibility for this issue to the Alaska Federation of Natives (AFN). Its president, Byron Mallott, testified in August 1977 that the AFN

> "believe[d] this legislation should confirm the subsistence rights of the Alaska Natives, not just to D-2 lands, but, as Congress plainly intended when it wrote its conference report [on ANCSA], to all Native subsistence uses on all Federal public lands."[23]

Mr. Mallott provided the Committee with a proposed subsistence provision for H.R. 39 to implement his proposal

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[21] *See* Hearings on H.R. 39, et al., Before the Subcommittee on General Oversight and Alaska Lands of the Committee on Interior and Insular Affairs. 95th Cong., 1st Sess., Serial 95-16, Part II, 20. (1977). (Hereafter "House Hearings").

[22] *Id.* at 148.

[23] House Hearings, Part XII at 53 (August 20, 1977). *See also, id.* at 52-61, 461-97.

The portion of the ANCSA Conference Report to which Mr. Mallott referred stated that "all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority." H. Rep. No. 92-746, 92d Cong., 1st Sess. 37 (1977). The Conference Committee went on to state that the Secretary could protect subsistence by "withdraw[ing] appropriate lands and classify[ing] them . . . and . . . by closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened." *Id.*

that subsistence protection extend beyond the d-2 lands.[24] This AFN proposal recast the subsistence provisions of the bill into essentially the form which they assumed when enacted as Title VIII of ANILCA. Section 703 of the AFN proposal would have divided "public lands and Native lands located within the exterior boundaries of each of the 12 regional corporations established by ANCSA" into "separate subsistence management zones."[25] Section 705(c), which served as the model for Section 810(a) as ultimately adopted, then provided that:

> "In determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy or disposition of public lands *in the Subsistence Management Zones*,"

the head of the relevant agencies should conduct an evaluation similar to that now required by Section 810(a).[26]

It is perfectly clear that the AFN proposed bill did not extend to the OCS, since it involved only the disposition of lands in "Subsistence Management Zones." Those zones were coterminous with "the exterior boundaries" of the 12 regional corporations established by ANCSA, and those corporations all lie within the boundaries of the State of Alaska. 43 U.S.C. § 1603(a).

H.R. 39 was thereafter amended to conform in all relevant respects to the AFN proposed bill. *See*, H.R. 39, Committee Print, October 28, 1977, § 704(a), establishing "Regional Subsistence Zones" within the boundaries of the 12 regional corporations and *id.*, § 714, dealing with disposition "of public lands in any regional zone." In April, 1978, the subsistence provisions of H.R. 39 were amended again to do away with the creation of "subsistence regional

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[24] House Hearings, Part XII at 489-97.

[25] *Id.* at 492.

[26] *Id.* at 497 (emphasis added).

zones," and the provisions regarding the disposition of lands were accordingly applied to all "public lands," defined as lands situated in Alaska to which the United States holds title.[27]

Mr. Mallott testified on this version of H.R. 39 and stressed that it incorporated all of the principles which had been embodied in the AFN's proposed bill, including "that any D2 subsistence management system apply to all federal lands in Alaska, not just D2 lands."[28] Neither he nor anyone else suggested that the deletion of the reference to subsistence zones, as it had been proposed by the AFN and as it had been reflected in the October 28, 1977 version of H.R. 39, in any way broadened the scope of the subsistence provisions to include OCS lands.

Thus, there is no basis in the legislative history of Section 810 for giving it a broader geographic scope than the rest of the statute. The subsistence provisions of ANILCA were designed solely to ensure that subsistence protection was not limited to the d-2 lands, but instead would pertain to all federally owned lands within Alaska's boundaries. That purpose was fully achieved when Title VIII of ANILCA was made applicable to all "public lands" "situated in Alaska" in the conventional sense of those terms. It was distorted beyond recognition by the Ninth Circuit's extention of Title VIII to the OCS.

3. No Legislative History Supports the Extension of ANILCA to the OCS.

The analysis of the legislative history relied upon by the Ninth Circuit to sustain its extension of ANILCA to the OCS is superficial and obviously flawed. First, the court noted several casual references in the ANILCA debates

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[27] Hearings Before the Subcommittee on Fisheries of the Committee on Merchant Marine and Fisheries, 95th Cong., 2nd Sess. 65 (§ 103(1)-(3)), 155 (§ 707) (1978).

[28] *Id.* at 462-63.

to the OCS as being "in Alaska," and thus concluded that the phrase was used in a "nontechnical" sense which could include the OCS. 746 F.2d at 575 (A5-6). It brushed aside the many contrary statements that ANILCA would not extend to the OCS on the ground that they pertained to portions of the statute other than Title VIII. 746 F.2d at 581-82 (A19-20).[29] However, the court failed to note that the references to the OCS as being "in Alaska" upon which it relied were also all made in debates regarding other titles. No statements were made in debates or elsewhere suggesting that the subsistence provisions of Title VIII should extend to the OCS. No member of Congress ever stated or implied that the OCS constituted "public lands" for purposes of Title VIII or any other provision of ANILCA.

The Ninth Circuit opined that the reference in the savings clause of ANILCA, 16 U.S.C. § 3125, to the Fishery Conservation and Management Act, 16 U.S.C. § 1801 (FCMA), evidenced Congress' intention to apply ANILCA offshore. However, that statute does not pertain solely to the OCS; it also applies to "anadromous species which spawn in United States rivers or estuaries." 16 U.S.C. § 1801(a)(1). *See also, id.* 1801(b)(1). Moreover, in certain

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[29] *See, e.g.*, statement of Representative Emery:

> "This legislation has nothing to do with the [OCS], and I do not think that there is any way we can legislate in this bill the policy that will be established on the [OCS]." 125 Cong. Rec. 11,170 (1979).

See also, statement of Representative Udall:

> "There are 203 million acres of sedimentary basins that have been identified offshore in Alaska.
>
> "Let me tell you how much is locked up by this bill. The answer is zero. Under other legislation [the 1978 OCSLA amendments] . . . we now have in place good [OCS] legislation. Plans are going forward and all the offshore lands in Alaska where the majority of the oil is to be found are left open by this bill." *Id.* at 11,128.

circumstances FCMA empowers the Secretary to "regulate the applicable fishery within the boundaries of such State. . .." *Id.* at § 1856(b)(1). Thus, the reference to the FCMA in the savings clause of ANILCA does not mean that the statute applies to the OCS.

Finally, the Ninth Circuit ruled that "the most compelling reason for resolving the ambiguous language of Title VIII in favor of [OCS] lands and waters is that Title VIII was adopted to benefit the Natives." 746 F.2d at 581 (A18). However, the Ninth Circuit failed to recognize that it could not expansively construe the phrase "public lands," as used in Title VIII of ANILCA, in isolation from the rest of the statute. Even if a principle of liberal construction should apply to those parts of Title VIII which are unique to it, such a principle cannot apply to terms of general applicability—like "public lands"—that are specifically defined by Title I of ANILCA and appear throughout the statute. In any event, even in cases where the principle of liberal construction does properly apply, it "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe*, 106 S. Ct. 2039, 2044 (1986). *See also*, cases cited *id.* at 2044 n.13.

4. The 1978 Amendments to the OCSLA Demonstrate that Congress Did Not Silently Extend ANILCA to the OCS.

Congress' consideration of ANILCA spanned almost the entire decade of the 1970s. At exactly the same time, Congress had under consideration extensive amendments to the OCSLA, which it adopted in 1978. Those amendments stressed the national need for accelerated development of OCS oil and gas resources,[30] articulated the specific responsibilities of the Department of the Interior

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[30] 43 U.S.C. §§ 1801(1)-(5), 1802(2).

to ensure that this vital national goal could be achieved in a manner that fully considers other competing values (including subsistence-related matters),[31] and insisted that leasing take place in a manner which reflects a proper balance between resource development and the avoidance of environmental harm.[32] Significantly, the 1978 OCSLA legislative history reveals that the OCS off Alaska was then believed to hold the potential for over 50% of all undiscovered OCS oil and gas,[33] and that Congress had clearly in mind creating a framework for OCS leasing that would protect the OCS and the Alaskan coast.[34]

The 1978 OCSLA amendments were the product of congressional committees composed of the same persons whose committees had principle responsibility for ANILCA.[35] Thus, the framers of ANILCA were well aware that the OCSLA provided a framework for the analysis of subsistence-related issues insofar as OCS lands were concerned. They were also aware of the Department of the Interior's responsibilities under NEPA to investigate fully

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[31] *See*, 43 U.S.C. § 1802(3), referring to the minimization of "risk of damage to the human, marine, and coastal environments," and *id.* at § (7), focusing upon the avoidance of conflicts with "the recovery of other resources such as fish and shellfish."

[32] *See*, 43 U.S.C. § 1344(a)(3) requiring a "balance" in designing an OCS leasing program; *id.* at § 1345(c) prescribing the same for OCS lease sales.

[33] H. Rep. No. 95-590, 95th Cong., 1st Sess. 71 (1977).

[34] *Id.* at 106.

[35] For example, Congressman Murphy was the chairman of the Ad Hoc House OCS Committee which reported the OCSLA amendments. *See, id.* at 218. Mr. Murphy was simultaneously chairman of the House Merchant Marine and Fisheries Committee, which had joint responsibility for reporting ANILCA. H. Rep. No. 96-97, Part II, 96th Cong., 1st Sess. (1979). Congressman Udall, chairman of the other House ANILCA committee, was also a member of the Ad Hoc OCS Committee. H. Rep. No. 95-590 at 288.

OCS-related impacts upon subsistence and alternatives that could avoid such impacts.[36]

Under these circumstances, if Congress had intended to impose additional statutory constraints on OCS activities by requiring compliance with the restrictions of Section 810 of ANILCA it surely would have said so. Congress's silence throughout the lengthy legislative history of ANILCA regarding its application to the OCS is therefore persuasive evidence that the statute was not intended to apply there.

II. THE NINTH CIRCUIT ERRED IN REQUIRING COMPLIANCE WITH SECTION 810(a)(1)-(3) AT THE LEASING STAGE OF SALE NO. 57.

We have shown in Part I above that ANILCA does not apply to the OCS. If the Court agrees with this argument, it is not necessary for it to reach the issues discussed in Parts II and III of this brief. However, even assuming *arguendo* that the subsistence provisions of ANILCA do apply to the OCS, the Ninth Circuit misconstrued that statute by requiring Interior to comply, at the leasing stage of an OCS project, with Section 810(a)(1)-(3) merely because significant subsistence restrictions could possibly occur at the final production stage of the project.

In the ANILCA evaluation for Sale No. 57, the Department emphasized that "at present, no development and production plans have been proposed," so that "the discussion of the development & production stage is based on . . . hypothetical scenarios and oil-spill-risk analysis. . . ." (Fed. Petn. App. 84a). Nonetheless, it considered the three issues specified in the first tier of Section 810(a)—

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[36] In this case, the district court held, and the court of appeals did not disagree, that "the effect of the leases on subsistence and alternatives which would reduce or eliminate the impacts on subsistence were discussed at some length in the respective EIS's for the lease sale." (A57).

effects upon subsistence, the availability of other land and the alternatives—for each of the three stages of Sale No. 57.

Following this evaluation, Interior determined that the lease sale and associated preliminary activities "will not significantly restrict subsistence uses." (Fed. Petn. App. 106a). Exploration was found "not likely to significantly restrict subsistence uses." *Id.*. Finally, while noting that there was only a 13-14% possibility that the development/production stage would be reached, Interior found that it could significantly restrict subsistence in certain localities. *Id.*[37]

The ultimate finding made with respect to the leasing decision regarding Sale No. 57 was unequivocal: "[T]he leasing of tracts in Sale No. 57 will not significantly restrict subsistence uses." *Id.* at 81a. This finding was based upon the determination that leasing and the preliminary activities at that stage would not have such effects, that exploration was unlikely to do so, and that development/production was unlikely to occur.[38] Based upon this finding, the Department determined that it need not presently give the notice, hold the hearings, or make the determinations contemplated by Section 810(a)(1)-(3), although it recognized that, should development/production stage of the project be reached, it might be necessary to do so. *Id.* at 106a.

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[37] For the St. Lawrence Island and Nome/Cape Nome regions Interior found that development/production, should it occur, could have community-wide and measurable impacts upon several subsistence species for one or two villages over a period of one or two years. *Id.* at 95a, 98a. The Department regards such impacts as "significant."

[38] At no point did the lower courts take issue with these findings. Indeed, the district court relied upon them in exercising its discretion to deny plaintiffs' injunction motions, when it held that neither leasing nor exploration would significantly restrict subsistence uses.

A. The Ninth Circuit's Holding that Interior Had Not Complied with ANILCA for Sale No. 57 Was Based upon a Distortion of the Terms of ANILCA.

The second-tier obligations recited in Section 810(a)(1)-(3) apply only when a proposed "lease" or "permit" "would significantly restrict subsistence." The plain meaning of the term "would" suggests a probability or likelihood. *See, INS* v. *Stevic*, 467 U.S. 407, 422 (1984), where the Court inferred from Congress' use of the word "would" that there must be a "likelihood" of the specified event and that it would not, therefore, be sufficient merely to find that the event "might" or "could" occur.

Had the Ninth Circuit applied the plain meaning of the term "would" in Section 810(a), it could not have held that Interior's decision to conduct Sale No. 57 "would significantly restrict subsistence." Plainly the decision to offer leases would not have such impacts. Moreover, that decision cannot be regarded as setting in motion a chain of events likely to have such impacts, since exploration is not likely to restrict subsistence significantly and since there is only a 13-14% likelihood of production.

Instead of giving plain meaning to the language of Section 810, the court of appeals held in *Gambell II* that the second-tier requirements of the statute must be complied with whenever a proposed disposition of public lands "may significantly restrict subsistence uses." 774 F.2d at 1422 (A34). Given the facts of this case, the court diluted the term "would" to mean "may" in the sense of any possibility of a future impact.[39]

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[39] Subsequently, the Ninth Circuit clarified that *Gambell II*'s transmutation of the word "would" into "may" requires leasing-stage compliance with the second tier of Section 810(a) when there is any risk or threat, even if "unlikely," of significant subsistence restrictions arising at the later stages of OCS projects. *Village of Akutan* v. *Hodel*, 792 F.2d 1376 (9th Cir. 1986).

B. This Court's Decision in *Secretary of the Interior* v. *California* Establishes that a Decision To Proceed with OCS Leasing Does Not Constitute Action that "Would Significantly Restrict Subsistence."

In *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984), the issue before the Court was whether an OCS lease sale "directly affect[s]" the coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1). Had the Court concluded that leasing did have such effects, Interior would have been required to make the lease sale "consistent" with a State's CZMA program.

The issue before the Court in this case is quite similar --whether the Secretary's decision to conduct a lease sale "would significantly restrict subsistence" within the meaning of Section 810(a) of ANILCA. If the leasing decision "would" have such consequences, the Secretary must comply with Section 810(a)(3) and make determinations comparable to those that would have been required under the CZMA to achieve consistency. This Court's decision in *Secretary of the Interior* that the offering of leases does not have "direct" effects on the coastal zone fully supports Interior's conclusion that the decision to offer Sale No. 57 leases does not entail consequences that "would" significantly restrict subsistence.[40]

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[40] *Secretary of the Interior* should be applied *a fortiori* to the facts of this case. The dissenting Justices stressed in that case that exploration and production were "the intended and most probable consequence[s]" of the leasing decision, 464 U.S. at 364, and that they were "the natural and expected consequence[s] of the original lease," *id.* at 373. Exploration following a lease sale is virtually inevitable, and in *Secretary of the Interior* it was conceded that exploration could have some effects upon the coastal zone. Here, by contrast, the significant restrictions of subsistence hypothesized by Interior all relate to the final production/development stage. While both government and industry hope, and in that sense intend, that this stage will be reached, it is neither the "most probable" nor the "expected" consequence of issuing leases.

The basis for the Court's holding in *Secretary of the Interior* that leasing does not "directly affect[]" the coastal zone was its recognition that "Congress ha[d] codified with great care," 464 U.S. at 336, "the distinction between a sale of a 'lease' and the issuance of a permit to 'explore for,' 'produce,' or 'develop' oil or gas" on the OCS. *Id.* at 335-36. After describing the three stages of an OCS project (as well as the preceding stage associated with preparation of a five-year leasing program), *id.* at 337-40, the Court concluded:

> "Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production. Since 1978, the purchase of an OCS lease, standing alone, entails no right to explore for, develop, or produce oil and gas resources on the OCS." *Id.* at 340.

The Court noted that

> "The stated reason for this four-part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the later stages of OCS exploration and production." *Id.* at 341.

Accordingly, the Court held that the issuance of an OCS lease would not directly affect the coastal zone when coastal-zone impacts would not occur until Interior's authorization of later stages of the project.

The same reasoning leads to the conclusion that OCS Sale No. 57 "would not significantly restrict subsistence." As to both the CZMA and ANILCA, the leasing stage of the project, separately considered, will not have the impacts that trigger application of the relevant statute.[41] Also,

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[41] The dissent in *Secretary of the Interior* stated that the lower courts' findings in that case "indicate[d] [that] some of those [coastal zone]

for both CZMA and ANILCA, it is necessary to conduct a further analysis under the statute prior to approval of any subsequent stage of an OCS project that is likely to cause such an impact. If Section 810(a) applies to the OCS, it requires ANILCA evaluations prior to the approval of exploration or development/production plans, since the statute applies whenever an agency proposes "to . . . permit the use . . . of public lands." If those evaluations show that the next stage "would significantly restrict subsistence," the Department must comply with Section 810(a)(1)-(3) before issuing a permit. Compare CZMA § 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B).

Thus, the basic policy underlying the OCSLA -- to "separate" the development/production decision from an OCS leasing decision in order to avoid "premature litigation regarding effects that all agree will flow, if at all, only from the later stages," 464 U.S. at 341 -- which controls the application of the CZMA to the OCS process, similarly applies here.[42]

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impacts will occur almost immediately, prior to review under the OCSLA, and can never be reviewed adequately if they are not reviewed now." 464 U.S. at 363. As an example of such impacts, it noted the California CZMA agency's objection to the "lack of onshore facilities, land, and population that can accomodate oil development." *Id.* at 363 n.19. There are no comparable findings here, either by the lower courts or by any State or federal agency. The lower court's insistence that there be compliance now with the full requirements of Section 810(a)(1)-(3) turns exclusively upon its concern with subsistence restrictions that might arise at the final production stage.

[42] The Ninth Circuit dismissed *Secretary of the Interior* as irrelevant on the ground that it did not involve ANILCA. 774 F.2d at 1422 (A35). However, this Court's recognition that the OCS process was carefully designed to ensure that the issuance of leases does not have coastal-zone or other similar impacts is relevant to all environmental statutes as they apply to OCS leasing. Indeed, the Ninth Circuit in an earlier case heavily relied upon *Secretary of the Interior* in defining the way in which both the Endangered Species Act (ESA), 16 U.S.C. § 1531, and NEPA apply to the OCS. *Village of False Pass* v. *Clark*, 733 F.2d

III. THE NINTH CIRCUIT'S DECISION IN *GAMBELL I* SHOULD NOT BE APPLIED RETROACTIVELY.

The only explanation provided by the Ninth Circuit for its injunction against exploration was that the two lease sales were not conducted in complete compliance with ANILCA. The lower court did not explain why this failing justified an injunction. However, its action seems to have been based on one of two alternative rationale: (1) that the sales were unlawful and all actions, such as exploration, taken in reliance upon the issuance of leases at the sales were similarly unlawful; or (2) that the sales might ultimately be declared unlawful after Interior performed additional ANILCA analyses.[43] Whatever the Ninth Circuit's rationale, it erred in premising its injunction upon a retroactive application of *Gambell I* that contemplates invalidation of OCS leases issued before that opinion.

Interior conducted seven OCS lease sales offshore Alaska between the enactment of ANILCA and the Ninth Circuit's

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605 (9th Cir. 1984).

The alternative ground for the lower court's refusal to follow *Secretary of the Interior*—that the purportedly more specific requirements of ANILCA override the allegedly more general ones of the OCSLA, 774 F.2d at 1422 (A35)—is equally misguided. ANILCA specifies the process to analyze and mitigate subsistence impacts; the OCSLA sets forth specific requirements regarding Department of the Interior approval of each of the stages of an OCS lease sale. It is illusory to ask which of the two statutes is more specific. Instead, the lower court should have searched, as this Court did in *Secretary of the Interior*, for an interpretation that gives full meaning to both.

[43] The dissent in *Gambell II* complained that the majority did not explain which of these two alternatives motivated its decision to mandate an injunction. 774 F.2d at 1431 (A53-54). However, it is clear that *Gambell II*'s injunction was based on one of them, rather than upon any purported flaws in the ANILCA analysis for the exploration plans themselves. As noted, p. 6, *supra*, Interior prepared explicit ANILCA evaluations for OCS Sale No. 83 exploration which concluded that it would not significantly restrict subsistence. Plaintiffs never challenged those evaluations, and the lower courts never suggested that they were invalid.

November 1984 decision in *Gambell I*; the bonuses paid by intervenors and other similarly situated companies at these seven lease sales total $4.19 billion.[44] Four of the seven sales occurred after plaintiffs filed their complaint against Sale No. 57. Aside from Sale No. 57, none was challenged under ANILCA prior to the issuance of leases. The three-part test articulated by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), for deciding whether to apply retroactively the novel construction of a statute shows that *Gambell I* should not be applied to void leases that were issued prior to the date of that decision.

First, *Gambell I* clearly "establish[ed] a new principle of law . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *See*, *Huson*, 404 U.S. at 106. Prior to *Gambell I*, the federal defendants had consistently interpreted ANILCA as not applying to the OCS. Moreover, that interpretation had been endorsed by the district court, and that interpretation had survived initial scrutiny by the Ninth Circuit when it refused to grant plaintiffs' motion for injunctive relief pending appeal. Even *Gambell I* recognized that "reasonable arguments can also be made for a narrow construction of Section 810" as not applying to the OCS. 746 F.2d at 581 (A19).

Second, retroactive application of *Gambell I* to void prior leases will not "further . . . [the statute's] operation." *See*, *Huson*, 404 U.S. at 107. The only violation of ANILCA found for Sale No. 83 was that, when the Department of the Interior stated in the EIS that no stage of the sale would have more than "negligible" impacts on subsistence, it was complying with NEPA and did not have the policies of ANILCA "clearly in mind." (A61). The only violation as to Sale No. 57 concerns issues that might arise at the production stage. Affording plaintiffs retroactive relief to invalidate either sale on these grounds is not necessary to

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[44] Federal Offshore Statistics, Minerals Management Service, pp. 12-15 (Sept. 1984).

further ANILCA's purposes. Assuming that ANILCA applies to the OCS, those purposes could be fully achieved by preparing ANILCA evaluations for all post-*Gambell I* exploration and development/production plans associated with the sales. As the district court found, such post-sale compliance with ANILCA "will be able to remedy any harm caused by the violation" at the leasing stage. (A63).

Third, retroactive invalidation of pre-*Gambell I* leases would result in grave inequities. *See, Huson*, 404 U.S. at 107. Intervenors have made investments of more than $4.19 billion in pre-*Gambell I* leases and have expended hundreds of millions more for exploration. Thus, the burden of retroactive application of *Gambell I* would fall upon intervenors and other similarly situated persons who, in good faith, relied upon the position of the Department of the Interior and the decision of the district court that ANILCA does not apply to the OCS.

Subsequent to *Chevron* v. *Huson*, this Court has declined to give retroactive effect to its construction of federal statutes or to its interpretation of the federal Constitution in cases similar to this one. In *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702, 719-20 (1978), the Court declined to invalidate pension plans successfully challenged under Title VII of the Civil Rights Act, and instead tailored relief to be prospective from the date of the Court's opinion. In doing so, the Court stressed that "the harm [of retroactive application] would fall in large part upon innocent third parties." 435 U.S. at 722-23.[45]

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[45] For similar reasons, the Court in *Arizona Governing Committee for Tax Deferred Annuity* v. *Norris*, 463 U.S. 1073 (1983), gave prospective-only relief regarding a clarification of the principles established in *Manhart*. See 463 U.S. at 1105-07 (Opinion of the Court per Justice Powell); 463 U.S. at 1109-11 (Justice O'Connor concurring and applying *Huson*).

Buckley v. *Valeo*, 424 U.S. 1, 142 (1976), applied the *de facto* officer doctrine to sustain the prior actions of the Federal Election Commission, even though the Court held that the Commission had been unconstitutionally appointed. *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982), relied on *Huson* to sustain the prior orders of unconstitutionally appointed bankruptcy judges. *See also*, *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969), where prior to *Huson* the Court refused to invalidate municipal bonds issued pursuant to elections which violated the XIV Amendment:

> "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

The principle that emerges from these cases is that courts should deny equitable relief to invalidate transactions on the basis of an unanticipated construction of a statute or the Constitution when the grant of such relief would result in "injustice or hardship." That principle dictates that OCS leases, issued prior to *Gambell I*'s unexpected declaration that the OCS is "situated in Alaska" for purposes of ANILCA, should not be retroactively invalidated.

IV. THE NINTH CIRCUIT ERRED IN MANDATING AN INJUNCTION EVEN THOUGH THE BALANCE OF IRREPARABLE HARM WEIGHED AGAINST PLAINTIFFS.

The district court denied plaintiffs' motion for an injunction after finding that "the balance of irreparable harm does not favor the movants" and that the public interest weighed against the issuance of an injunction. (A63). Without branding these conclusions as an "abuse of discre-

tion,"[46] the court of appeals held that the very application of such a balancing test was reversible error.

The Ninth Circuit stated that the plaintiffs did not need to demonstrate the existence of irreparable harm because " '[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.' " *Gambell II*, 774 F.2d at 1423 (A36). Moreover, any consideration of the harm that would befall others and their competing equities was held to be irrelevant. Instead, the "Ninth Circuit rule" was said to be that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" where an injunction would interfere with a long-term contractual relationship or where it would do more environmental harm than good. 774 F.2d at 1423 (A38).

A. The Ninth Circuit's *Per Se* Rule Is Directly Contrary to This Court's Holding in *Weinberger* v. *Romero-Barcelo* and to Traditional Equity Principles.

In *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the district court had refused to enjoin the Navy's discharge of ordnance, despite its holding that the Navy was violating the Clean Water Act. The First Circuit mandated an injunction against future discharges, holding that the Clean Water Act required an injunction whenever a violation occurred. 456 U.S. at 310-11.

This Court reversed. It traced the long history of equity in the federal courts and emphasized that an injunction is an extraordinary remedy which requires a showing of irreparable harm, a balancing of the interests of the affected parties, and a regard for the public consequences of the

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[46] Such a finding is necessary when an appellate court reverses a district court's refusal to grant an injunction because it disagrees with fact-finding relevant to the fashioning of a decree. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982).

order. 456 U.S. at 311-13. While acknowledging that Congress can remove an equity court's discretion, this Court declined so to interpret the Clean Water Act because it did not evidence with sufficient clarity Congress' intention to take such extraordinary action:

> "[T]he comprehensiveness of this equitable discretion is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

456 U.S. at 313, quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). *See also, Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944); *United States* v. *Rodgers*, 461 U.S. 677, 708 (1983); *Mitchell* v. *Robert DeMario Jewelry Inc.*, 361 U.S. 288, 291 (1960).

ANILCA does not limit the scope of equity courts' discretion to grant or to withhold relief regarding violations of Section 810. No provision of ANILCA specifies the remedies to be used for violations of that section.[47] Moreover, Section 810 gives no indication that it must be inflexibly enforced via a *per se* rule.[48] Thus, ANILCA does not constitute a "clear and valid legislative command" to the fed-

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[47] Section 807(a), which deals with violations of Section 804, states that a district court "*may* grant preliminary injunctive relief." 16 U.S.C. § 3117(a) (emphasis added).

[48] *Gambell I* itself recognized that the subsistence interests protected by ANILCA might ultimately yield when they conflict with OCS oil and gas development. 746 F.2d at 582 (A19-20). The Ninth Circuit simply ignored this holding when in *Gambell II* it asserted that "Congress has chosen the protection of subsistence life over oil exploration." 774 F.2d at 1426 n.2 (A43).

eral courts barring the exercise of their normal equitable powers in framing remedies for Section 810 violations.[49]

Rather than analyzing ANILCA from the perspective required by *Weinberger*, the Ninth Circuit simply declared that it had no relevance to this case because *Weinberger* "did not involve the tension between the requirements of [ANILCA] and [OCSLA]," and because it presented only a "narrow question" involving the Clean Water Act. *Gambell II*, 774 F.2d at 1426 n.2 (A42). This attempt to trivialize this Court's holding in *Weinberger* is obviously without merit.

This Court's wide-ranging discussion of equity practice in *Weinberger* shows that it involved more than interpretation of the Clean Water Act. 456 U.S. at 311. Moreover, this Court has on two occasions[50] and the other circuits have on numerous others[51] emphasized that *Weinberger* is

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[49] *Gambell II*'s *per se* rule was based on *TVA* v. *Hill*, 437 U.S. 153 (1978), where this Court held that Congress had limited the district court's discretion to refuse an injunction for a violation of Section 7 of the ESA. 774 F.2d at 1426 (A43). *Hill* has never been cited by this Court for the proposition that every violation of an environmental statute requires an injunction. Indeed, this Court noted in *Hill* that *Hecht* v. *Bowles* had held that, absent a very clear congressional command, a court's equity powers must be broadly construed. *Hill*, 437 U.S. at 193-94.

[50] In *United States* v. *Rodgers*, 461 U.S. at 708, this Court cited *Weinberger* for the proposition that "Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." In *Park 'n Fly, Inc.* v. *Dollar Park and Fly*, 105 S. Ct. 658, 674 (1984) (dissenting opinion), Justice Stevens cited *Weinberger* for the principle that "injunctions do not issue as a matter of course," even though he dissented in *Weinberger*.

[51] *See, e.g., Greenwood Utilities Commission* v. *Hodel*, 764 F.2d 1459, 1462 (11th Cir. 1985); *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404, 416-17 (1st Cir. 1985); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 581 (7th Cir. 1985); *Sierra Club* v. *Army Corps of Engineers*, 701 F.2d 1011, 1039 (2d Cir. 1983); *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982).

to be given broad application. Only the Ninth Circuit has attempted to limit *Weinberger* to cases arising under the Clean Water Act.[52]

By misunderstanding *Weinberger* and erecting a *per se* rule, the Ninth Circuit committed three fundamental errors that are contrary to that decision and to long-enduring principles governing the award of equitable relief. First, the court of appeals abrogated the requirement that plaintiffs must show irreparable harm. This Court has repeatedly held that the basis for the extraordinary remedy of injunctive relief in the federal courts is harm that is irreparable because of the inadequacy of legal remedies. *Weinberger*, 456 U.S. at 312. This requirement may not be ignored merely because a statute has been violated. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-08 (1976); *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 506-07 (1959).

Second, the court of appeals' *per se* rule disregards the real irreparable harm that would have been suffered by the defendants if an injunction had issued. In the district court, the intervenor-defendants demonstrated that an injunction would result in the loss of $70 million in prior commitments made for exploration. (JA 25-55). Also, Interior argued and the district court found that an injunc-

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[52]Scholars have consistently given *Weinberger* the broad reading implicit in this Court's opinion. *See*, Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121, 141-46 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 31 (1984); Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 878 (1983). *But cf.* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). However, even Plater's interpretation is broader than the one advanced by the Ninth Circuit, since he agrees that *Weinberger* allows district courts to authorize temporary noncompliance with a statute when, as here, future compliance is likely.

tion would cause irreparable harm to "this nation's quest for new oil resources and energy independence." (A62-63). These are countervailing equities that *Weinberger* and other cases insist be considered prior to the exercise of federal injunctive power. *Weinberger*, 456 U.S. at 312; *Hecht*, 321 U.S. at 329.

Third, the Ninth Circuit rule withdraws from the district courts their traditional discretionary power to balance the equities. The classic exposition of this role was set out by this Court in *Hecht*, 321 U.S. at 329-30:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. . . ."

The essence of equity has been the power of the Chancellor to mold each decree to the necessities of the particular case. Flexibility rather than rigidity is the rule. Thus, the award of an injunction has never been considered a matter of right, even when there is an undoubted violation of a statute or legal right. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). *See also*, *Weinberger*, 456 U.S. at 311; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946); *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 359 (1933).[53]

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[53] The need for flexibility is especially great when, as here, the use of equitable powers will have great consequences for the public interest. *Yakus*, 321 U.S. at 440. Thus, this Court has stated that, when the public interest is implicated, "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.*, 328 U.S. at 398. *See also*, *Weinberger*, 456 U.S. at 312; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937); *Railroad Commission* v. *Pullman*, 312 U.S. 496, 500 (1941).

B. The Ninth Circuit's *Per Se* Rule Led to an Injunction that Will Not Remedy Past Violations but Will Instead Merely Punish Innocent Parties.

The sole justification for a preliminary injunction is to prevent plaintiff from suffering irreparable harm pending a decision on the merits. *Sampson* v. *Murray*, 415 U.S. at 88; *Brown* v. *Chote*, 411 U.S. 524, 456 (1973). The sole justification for an injunction following a determination of the merits is to remedy the effects of the violation that a plaintiff has proved when there is no adequate redress at law. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 60; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring). Moreover, as this Court held in *Weinberger*, "the historic injunctive process was designed to deter, not to punish." 456 U.S. at 310 (quoting *Hecht*, 321 U.S. at 329-30).[54] The injunction mandated below violates all of these principles.

Plaintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale Nos. 57 and 83 leases without complying with ANILCA in the manner deemed necessary by the Ninth Circuit. Moreover, the district court found that the conduct of exploration would itself not harm plaintiffs, and the court of appeals did not reverse that finding as an abuse of discretion. The only "harm" that the Ninth Circuit could identify flowing from a violation of ANILCA was the "irreparable damage" that the Ninth Circuit "presume[s] when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 774 F.2d at 1423 (A36).

Even assuming *arguendo* that this type of abstract injury qualifies as "harm" for purposes of fashioning equi-

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[54] *See also, United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *Wallace* v. *Cutten*, 298 U.S. 229, 237-37 (1936).

table remedies,[55] it is clear that that harm occurred once and for all at the time the Sale Nos. 57 and 83 leases were issued. The decisions made by Interior to proceed with leasing in the Sale Nos. 57 and 83 areas without compliance with ANILCA cannot be undone by an injunction against exploration. Moreover, even if those decisions must be reconsidered, after full compliance with ANILCA, an injunction against exploration does nothing to facilitate that reconsideration. Thus, an injunction against exploration does nothing to address the "harm" which the Ninth Circuit declared that plaintiffs had suffered.

The only certain consequence of that injunction is that, had it been issued by the district court when it was initially sought by the plaintiffs, it would have imposed losses of at least $70 million upon industry petitioners, even though they were in no way responsible for the Department of the Interior's compliance with ANILCA. (JA 25-55). Punishment *per se* can never justify an injunction; *a fortiori* an injunction that imposes punishment upon innocent parties is invalid.

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[55] In *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983), the First Circuit advanced the theory that, because NEPA is meant to influence the decision-making process, the harm the Act is designed to avoid occurs whenever a decision is made without taking NEPA into account. This notion of abstract "procedural" harm has been questioned by other courts. *See, e.g., Wisconsin* v. *Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984); *United States* v. *162.20 Acres of Land*, 733 F.2d 377, 378 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985). Whatever its merit, this theory can justify an injunction only in circumstances, like *Massachusetts* v. *Watt*, where it is issued before the decision and thus preserves the opportunity of the federal agency to make a decision after compliance with the relevant statute. *Compare, Alaska* v. *Andrus*, 580 F.2d 465, 486 (D.C. Cir.), *vacated in part on other grounds as moot*, 439 U.S. 922 (1978), where the court refused to enjoin ongoing OCS exploration after discovering a leasing-stage NEPA violation which had occurred two years earlier.

CONCLUSION

For all the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

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